

Internal Revenue Service  
**memorandum**

CC:TL-N-3129-91

Br4:RJBasso

date: FEB 15 1991

to: District Counsel, Laguna Niguel W:LN

from: Assistant Chief Counsel (Tax Litigation)

subject: [REDACTED]

This is in response to your January 22, 1991 request for formal tax litigation advice in the above-entitled case.

ISSUES

1. Whether the first notice of deficiency was mailed to the taxpayer's last known address.
2. Whether the second notice of deficiency is timely when it is mailed more than three years from the filing of the return but within the suspension period provided in I.R.C. § 6503(a) upon issuance of the first notice of deficiency.
3. How should the respondent proceed with respect to the petition in this case which was filed within 90 days of mailing of the second notice of deficiency?

CONCLUSIONS

1. The first notice of deficiency was mailed to the taxpayer's last known address. Because of the confusion surrounding the issuance of the second notice of deficiency for the same amount for the same year, the Examination Division at the district level should be requested to re-review the administrative file materials to confirm this conclusion.
2. The second notice of deficiency was not timely mailed.
3. Respondent should move the court to dismiss the petition for lack of jurisdiction on the basis that the petition was not timely filed from the first notice of deficiency.

FACTS

This case involves an \$ [REDACTED] income tax deficiency for [REDACTED]. The Service timely mailed a notice of deficiency to the petitioner on [REDACTED] at the address appearing on its computer records, the [REDACTED] address, with a duplicate original

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mailed to the petitioner at the [REDACTED] address. Both notices were mailed by certified mail and both notices are reflected on the certified mailing list.

Both original notices were subsequently returned to the Service. The [REDACTED] notice was returned on [REDACTED] by the USPS with a "no forwarding order on file" notation and the [REDACTED] notice was returned by the USPS on [REDACTED] with an "unclaimed" notation and bearing the [REDACTED] forwarding address. The Service mailed the second notice of deficiency on [REDACTED] to the [REDACTED] address. The taxpayer timely filed its petition from the second notice of deficiency. The second notice of deficiency does not seek an additional deficiency from the taxpayer but represents the same \$ [REDACTED] liability determined owing for [REDACTED]. The petition, which was filed on [REDACTED], addresses the merits of the Service income tax determination and requests the Tax Court to enter a decision of no deficiency.

In the answer, Respondent denied the allegations in the petition and affirmatively answered that the petition was not timely filed from the first notice of deficiency, which was mailed to petitioner's last known address. The answer went on to disavow reliance on the second notice of deficiency, advising the court that respondent will move for dismissal of the petition as untimely filed, without a determination as to the validity of the first notice of deficiency. The \$ [REDACTED] plus interest for [REDACTED] was assessed on [REDACTED].

The petition and answer in this case were the subject of informal telephonic advice from the Tax Litigation Division because of time constraints. You now seek formal tax litigation advice.

#### DISCUSSION

1. Last Known Address. As far as we can ascertain, petitioner's counsel has not asserted a basis for arguing that the first notice of deficiency was not mailed to the taxpayer's last known address, although he did deny that allegation in Respondent's answer in his reply. Inasmuch as the foundation for the Service's assessment rests on this [REDACTED] notice of deficiency, the Examination Division should re-review the administrative file and its procedures in this case to confirm that the notice was sent to the last known address. If you require our further views on this aspect once additional information becomes known, please let us know.

In a [REDACTED] letter to District Counsel, taxpayer's attorney stated that "[REDACTED]"

The attorney may be arguing that the Service abandoned the first notice of deficiency. Skaneateles Paper Co. v. Commissioner, 29 B.T.A. 150 (1933) (notice of deficiency specifically withdrawn). However, that is not the situation here. The facts do not support an abandonment: the [REDACTED] second notice which was for the same amount did not so state and the Service's [REDACTED] assessment from the first (defaulted) notice is inconsistent with any such argument. See Harne v. Commissioner, T.C. Memo 1986-401 and Mitteldorfer v. Commissioner, T.C. Memo 1979-503 (no withdrawal took place). Furthermore, prior to the addition of section 6212(d) to the Internal Revenue Code permitting rescission of a notice of deficiency with the permission of the taxpayer, Service position had been that a notice of deficiency, once issued, could not be withdrawn. Withdrawal of Notice of Deficiency, G.C.M. 39203, I-6-80 (March 27, 1984).

Of course, the [REDACTED] second notice of deficiency must be timely mailed in order to be a valid notice. Here, the second notice was not mailed within three years of the filing of

<sup>1</sup> I.R.C. § 6212(d), added by the Tax Reform Act of 1986, is effective with respect to all notices issued on or after January 1, 1986.

the taxpayer's [REDACTED] tax return, [REDACTED]. Yet it was mailed within the suspension period provided by I.R.C. § 6503 from the timely mailing of the first notice of deficiency, [REDACTED]. Thus, the issue is whether the second notice of deficiency, issued within the suspension period of the timely first notice of deficiency, is itself timely.

We believe that it is not.<sup>2</sup> The answer to this question was settled long ago by Commissioner v. Wilson, 23 B.T.A. 644 (1931), aff'd 60 F.2d 501 (10th Cir. 1932). In Wilson, both the Tax Court and the Tenth Circuit concluded that the predecessor of I.R.C. § 6503 did not serve to "extend" the period of limitations for a second notice of deficiency.

The Service in Wilson sought a greater deficiency, though a second notice of deficiency which was the subject of the taxpayer's petition to the Board of Tax Appeals; the first notice of deficiency was not petitioned by the taxpayer. The courts concluded that the suspension provision was operable only as to the tax in the first notice of deficiency. A second notice of deficiency issued beyond the usual limitation period (then four years) but within the suspension period of the first notice of deficiency would not be timely. Among other considerations influencing the Tenth Circuit was the fact that "if the mere assertion of a part of the deficiency extends the limitations statute 120 [now 150, 90 plus 60] days for all purposes, the statute could be tolled indefinitely by the simple expedient of successive notices. ..." 60 F.2d at 504.

This situation here is not unlike that in King v. Commissioner, T.C. Memo 1988-26. In that case, the Service issued a timely notice of deficiency for taxpayers' 1984 year and no Tax Court petition therefrom was ever filed. Thereafter, the Service sent taxpayers a letter report reducing the amount of the deficiency, from which a timely petition was filed by taxpayers in the Tax Court. Initially, the Tax Court observed that I.R.C. § 6212(c) is not a basis for arguing that the letter report could not constitute a second notice of deficiency. However, the Tax Court determined that the letter report itself was not a valid notice of deficiency under established principles and, as such, could not form the predicate for Tax Court jurisdiction. Since


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<sup>2</sup> Treas. Reg. § 301.6503(a)-1 states that "[I]f a notice of deficiency is mailed to the taxpayer within the period of limitation and the taxpayer does not appeal there from to the Tax Court, the notice of deficiency so given does not suspend the period of limitation with respect to any additional deficiency shown to be due in a subsequent deficiency notice."

the petition was not timely filed with respect to the first notice of deficiency, taxpayers' petition was dismissed for lack of jurisdiction.

3. Motion to Dismiss for Lack of Jurisdiction. The respondent should file a motion to dismiss for lack of jurisdiction on the basis that suit is untimely, i.e., not filed within 90 days of the first notice of deficiency.

MARLENE GROSS  
Assistant Chief Counsel  
(Tax Litigation)

By:   
HENRY G. SALAMY  
Chief, Branch No. 4  
Tax Litigation Division

Enclosures:  
Admin. file  
Legal file